

COMPUTER USE AGREEMENT
FOR THE
NEW YORK BLUE

This Agreement is entered into by

BROOKHAVEN SCIENCE ASSOCIATES, ("Contractor"),

which operates Brookhaven National Laboratory ("Brookhaven"), Upton, New York 11973, under
Contract No. DE-AC02-98CH10886 ("Prime Contract") with the United States Government as
represented by the U.S. Department of Energy ("DOE"),

and _____ ("User")

(Collectively, "the Parties")

ARTICLE I: SCOPE OF SERVICES

CONTRACTOR will make available to USER certain facilities, equipment, services, information and other material as set forth in this agreement. In particular, CONTRACTOR will grant USER access (i) via the internet, at no cost, to use certain NYBLUE; and (ii) will allow USER representatives use of NYBLUE and the object code of NY Blue Gene operational software (IBM Software) on NYBLUE.

Under the terms of this Agreement, the USER will be granted access to and use of the facility for the conduct of non-proprietary research (also referred to herein as "activities"), which research must first receive programmatic approval of the facility director and available scheduling therefor. It is understood and agreed that the approval determinations of the director of the facility are final.

It is understood that to receive such approval, the USER is obligated to provide a proposal disclosing a functional non-proprietary description of the experimental work, since such information is essential to the CONTRACTOR to operate the facility. Any proposal for non-proprietary research submitted to the CONTRACTOR which is not approved for performance at the facility shall be returned to the USER and the CONTRACTOR and DOE shall obtain no rights in such proposal. The User agrees to notify the User Office if it intends to conduct any proprietary research at the facility so that the appropriate Proprietary Users Agreement can be first put into place.

ARTICLE II. TERM OF THE AGREEMENT

This Agreement shall become effective when signed by the parties hereto and shall continue as long as representatives from User are conducting research at the facility, unless sooner terminated upon written notice by either party.

ARTICLE III: COST USER will bear its own costs and expenses associated with this Agreement.

ARTICLE IV: ADMISSION REQUIREMENTS

- A. General** - USERS are subject to the administrative and technical supervision and control of CONTRACTOR; and will comply with all applicable rules of CONTRACTOR and DOE with regard to admission to and use of the facility, including safety, operating and health-physics

procedures, environment protection, access to information, hours of work, and conduct. USER is required to obtain agreements from each of the employees or representatives as necessary to implement the provisions of the Agreement. USER's employees will not be considered employees of CONTRACTOR for any purpose.

- B. Safety and Health** - USER shall take all reasonable precautions with regard to the installation of equipment and performance of experiments to protect the safety and health of others and to protect the environment, and shall comply with all applicable safety and health regulations and requirements of the facility, the CONTRACTOR, and the Government. If USER fails to comply with said regulations or requirements, the CONTRACTOR may, without prejudice to any other legal or contractual rights, issue an order stopping all or any part of USER's activities at the facility.
- C. ISMS** - CONTRACTOR's Integrated Safety Management System ("ISMS") must be used by all Laboratory Staff and Users to establish work planning and control requirements at CONTRACTOR so that all work is planned and implemented properly, hazards and risks are identified and controlled, resources are scheduled and coordinated, and appropriate feedback mechanisms are in place. "Work" is defined as the activities that involve the design, conduct and completion of experiments by Brookhaven Staff or Users. The Work Planning and Control Management System includes the Environmental Safety and Health ("ESH") Standard 1.3.5, Planning and Control of Experiments and ESH Standard 1.3.6, Work Planning and Control for Operations.
- D. Training** - CONTRACTOR has established training programs in accordance with regulatory requirements for work to be performed, hazards that may be encountered, areas to be accessed, potential for risk, and general site requirements. CONTRACTOR's Training and Qualifications Program ensures that Laboratory staff and USERS are trained and qualified to perform their assigned tasks and job functions.
- E.** Individuals for whom USER is responsible, but who are not actual employees of USER, shall execute any and all documents required by CONTRACTOR to access and use the facility.

ARTICLE V: PROPERTY AND MATERIALS USER reserves the right to furnish equipment, tooling, test apparatus, or materials necessary to assist in the performance of its experiment(s) at the facility. Such items shall remain the property of USER. Unless the parties otherwise agree, USER will remove its Software from the NYBLUE when it is done using NYBLUE but no later than the end of the Agreement. USER will use the NYBLUE to enable and test USER Software. Unless this Agreement permits it, USER will not copy or erase any code or data from any of the NYBLUE.

Any equipment that becomes integrated into the facility shall be the property of the Government. USER acknowledges that any material supplied by USER may be damaged, consumed or lost. USER will return facilities and equipment utilized in their original condition except for normal wear and tear.

CONTRACTOR shall have no responsibility for USER's property in CONTRACTOR's possession other than loss or damage caused by willful misconduct or gross negligence of CONTRACTOR or its employees.

Personal property produced or acquired during the course of this Agreement shall be disposed of as directed by the owner at the owner's expense.

ARTICLE VI: SCHEDULING USER understands that CONTRACTOR will have sole responsibility and discretion for allocating and scheduling usage of the facilities and equipment needed for or involved in the Activity. Availability is subject to scheduled maintenance and unanticipated conditions such as a power failure.

ARTICLE VII: INTELLECTUAL PROPERTY PROVISIONS

The rights of the parties in patents, Technical Data, copyrights and other intellectual property that may arise under this Agreement are set forth in Attachment A of this Agreement.

Individuals for whom USER is responsible, but who are not actual employees of USER, shall be considered employees of USER solely for the purposes of ownership of intellectual property in accordance with Attachment A.

ARTICLE VIII: EXPORT CONTROLS USER acknowledges that the export of goods or Technical Data may require some form of export control license from the U.S. Government and that failure to obtain such export control license may result in criminal liability under the laws of the United States.

ARTICLE IX: RECORDS AND ACCOUNTING SYSTEM USER will maintain records of receipts, expenditures, and the disposition of all Government property in its custody, related to the Agreement.

ARTICLE X: PUBLICATIONS

USER will not use the name of CONTRACTOR, the name “Brookhaven National Laboratory”, or name of the United States Government or their employees in any promotional activity, such as advertisements, with reference to any product or service resulting from this Agreement, without prior written approval of the Government and CONTRACTOR.

ARTICLE XI: ADMINISTRATION OF THE AGREEMENT This Agreement is entered into by CONTRACTOR under the authority of its Prime Contract with DOE. CONTRACTOR will administer this Agreement in all respects. Administration of this Agreement may be transferred from CONTRACTOR to DOE or its designee with notice of such transfer to USER, and CONTRACTOR will have no further responsibilities except as set forth in Article XVI of this Agreement.

ARTICLE XII: DISPUTES The parties will attempt to jointly resolve all disputes arising from this Agreement. If the parties are unable to jointly resolve a dispute within a reasonable period of time, the dispute will be decided by the DOE Contracting Officer. After the Contracting Officer’s decision is made, either Party may request that the dispute be settled by arbitration in accordance with the then current and applicable rules of the American Arbitration Association. Judgment upon the award rendered by the Arbitrator(s) shall be nonbinding on the Parties, and any costs incurred therefrom shall be divided equally between the Parties.

ARTICLE XIII. CONFLICT OF TERMS This agreement constitutes the primary document which governs the work described in the proposal. In the event of any conflict between the terms of this document and any other document issued by either party, the terms of this document shall prevail.

ARTICLE XIV: INDEMNITY AND LIABILITY

- A. Personnel Relationships** - USER shall be responsible for the acts or omissions of its employees and agents and of all other persons that USER allows to participate in the activities under this Agreement.
- B. General Liability** - To the extent permitted by applicable law, USER hereby agrees to indemnify and hold harmless CONTRACTOR and the United States Government, their officers, agents and employees from any and all liability, claims, damages, costs and expenses, including attorney fees, for injury to or death of persons, or damage to or destruction of property, to the extent such liability, claims, or damages is caused or contributed to by the intentional or negligent act or willful misconduct of USER or its employees or representatives during the performance of the work under this Agreement.
- C. General Disclaimer** - Except to the extent of their negligence or intentional misconduct, neither the Government nor the CONTRACTOR, nor persons acting on their behalf will be responsible for any injury to or death of persons or other living things or damage to or destruction of property or for any other loss, damage, or injury of any kind whatsoever resulting from the performance of services or furnishings of materials hereunder, unless provided otherwise by applicable law.

USER will prevent any viruses or Harmful Code from entering NYBLUE as a result of USER's internet access. "Harmful Code" means any computer programming code constructed with the intent or likelihood of damage to or interference with other computer programs, data files or hardware, without the knowledge or consent of the computer user. "Harmful Code" includes self-replicating and self-propagating program instructions such as viruses, worms, or the like. USER will promptly notify CONTRACTOR if USER discovers or suspects that Harmful Code has entered NYBLUE, and CONTRACTOR may take any steps to protect NYBLUE without notice to USER, including, without limitation, termination of USER's access rights.

THE GOVERNMENT AND CONTRACTOR MAKE NO EXPRESS OR IMPLIED WARRANTY AS TO THE CONDITIONS OF THE RESEARCH OR ANY INTELLECTUAL PROPERTY, GENERATED INFORMATION, OR PRODUCT MADE OR DEVELOPED UNDER THIS AGREEMENT, OR THE OWNERSHIP, MERCHANTABILITY, OR FITNESS FOR A PARTICULAR PURPOSE OF THE RESEARCH OR RESULTING PRODUCT; THAT THE GOODS, SERVICES, MATERIALS, PRODUCTS, PROCESSES, INFORMATION, OR DATA TO BE FURNISHED HEREUNDER WILL ACCOMPLISH INTENDED RESULTS OR ARE SAFE FOR ANY PURPOSE INCLUDING THE INTENDED PURPOSE; OR THAT ANY OF THE ABOVE WILL NOT INTERFERE WITH PRIVATELY OWNED RIGHTS OF OTHERS. NEITHER THE GOVERNMENT NOR CONTRACTOR SHALL BE LIABLE FOR SPECIAL, CONSEQUENTIAL, OR INCIDENTAL DAMAGES ATTRIBUTED TO SUCH RESEARCH OR RESULTING PRODUCT, INTELLECTUAL PROPERTY, GENERATED INFORMATION, OR PRODUCT MADE OR DELIVERED UNDER THIS AGREEMENT.

ARTICLE XV: ENTIRE AGREEMENT It is expressly agreed by the parties hereto that this Agreement constitutes the entire and only contract between the parties with respect to the non-proprietary research to be conducted at the facility; that there are no agreements, understandings or covenants between the parties hereto of any kind, nature or description, express or implied, oral or otherwise which have not been set forth herein, and that this Agreement cannot be modified, altered, amended or changed, nor any provision thereof waived or abrogated, except by an instrument in writing and duly executed on behalf of each of the parties hereto by the duly authorized representatives or officers of each party who have been expressly authorized in writing to execute such an instrument.

ARTICLE XVI: TERMINATION Either party may terminate this Agreement for any reason at any time by giving not less than thirty (30) days prior written notice to the other party. Notice will be deemed made as of the day of receipt. The obligations of any clause of this Agreement, which by their nature extend beyond its termination, shall remain in full force and effect until fulfilled.

USER:

BROKHAVEN SCIENCE ASSOCIATES

By

By

(Signature)

(Signature)

Name Insert Name

Name Lori-Anne Neiger

Title Insert Title

Title Chief Intellectual Property ‘Counsel
Office of Intellectual Property and Sponsored Research

Date _____

Date _____

Mailing Address of Institution:

Insert Address

ATTACHMENT A

INTELLECTUAL PROPERTY PROVISIONS

1. PATENT RIGHTS

(a) Definitions

- (1) "User" means the person or entity with which this agreement is made.
- (2) "Subject Invention" means any invention or discovery of the User, conceived or first actually reduced to practice in the course of or under this agreement, and includes any are, method, process, machine, manufacture, design, or composition of matter, or any new an useful improvement thereof, or any variety of plants, whether patented or unpatented under the Patent Laws of the United States of American or any foreign country.
- (3) "Facility Operator" means the operating contractor which manages and operates the Government-owned, contractor-operated facility where the work under this agreement is to be performed.
- (4) "Patent Counsel" means the DOE Patent Counsel assisting the Facility Operator.

(b) Rights of Government

(1) Assignment to the Government

The User agrees to assign to the Government, upon request, the entire right, title, and interest in any country to each Subject Invention of the User.

(2) Terms and Condition of Waived Rights

- (i) To preserve the Government's rights to Subject Inventions, the User shall take all actions in reporting invention rights promptly, but in any event, in sufficient time to satisfy domestic and foreign statutory and regulatory time requirements.
- (ii) The user shall convey or assure the conveyance of any executed instruments necessary to vest in the Government the rights set forth in this clause.

(c) Invention Identification, disclosure, and reports

- (1) The User shall furnish the Patent Counsel a written report containing full and complete technical information concerning each Subject Invention of the User within 6 months after conception or first actual reduction to practice, whichever occurs first, in the course of or under this contract, but in any event prior to any on sale, public use or public disclosure of such invention known to the User. The report shall identify the agreement and inventor and shall be sufficiently complete in technical detail and appropriately illustrated by sketch or diagram to convey to one skilled in the art to which the invention pertains a clear understanding of the nature, purpose, operation, and to the extent known, the physical, chemical, biological, or electrical characteristics of the invention.
- (2) The User shall furnish, upon request, but not more than annually, interim reports on a DOE-approved form listing subject inventions for that period and certifying that all subject inventions have been disclosed or that there were no such inventions.
- (3) The User agrees that the Government may duplicate and disclose subject invention disclosures and all other reports and papers furnished or required to be furnished pursuant to this Use Agreement.

(d) Minimum rights to the User

The User reserves a revocable, nonexclusive, paid-up license in each patent application filed in any country on a subject invention and any resulting patent in which the Government acquires title.

(d) Facilities License

In addition to the rights of the parties with respect to inventions or discoveries conceived or first actually reduced to practice in the course of or under this agreement, the User agrees to and does hereby grant to the Government an irrevocable, non-exclusive paid-up license in and to any inventions or discoveries regardless of when conceived or actually reduced to practice or acquired by the User, which at any time through completion of this contract are owned or controlled by the User and are incorporated in the facility as a result of this agreement to such an extent that the facility is not restored to the condition existing prior to the agreement (1) to practice or to have practiced by or for the government at the facility, and (2) to transfer such license with the transfer of that facility. The acceptance or exercise by the Government of the aforesaid rights and license shall not prevent the Government at anytime from contesting the enforceability, validity or scope of, or title to, any rights or patents herein licensed.

2. NOTICE AND ASSISTANCE REGARDING PATENT AND COPYRIGHT INFRINGEMENT

- (a) The User shall report to the Government, promptly and in reasonable written detail, each notice or claim of patent or claim of patent or copyright infringement based on the performance of this agreement of which the User has knowledge.
- (b) In the event of any claim or suit against the Government on account of any alleged patent or copyright infringement arising out of the performance of this agreement or out of the use of any supplies furnished or work or services performed hereunder, the User shall furnish to the Government when requested by the Government, all evidence and information in possession of the User pertaining to such suit or claim. Such evidence and information shall be furnished at the expense of the Government except where the User has agreed to indemnify the Government.

3. RIGHTS IN TECHNICAL DATA

(a) Definitions

- (1) The definitions set forth in 48 C.F.R. 52.227-14 apply to the extent those terms are used herein.
- (2) "Contracting Officer" means the DOE entity having contract authority over the Facility and facility Operator.

(b) Allocation of Rights

- (1) The government shall have:

- (i) Unlimited rights in technical data first produced or specifically used in the performance of this agreement; unlimited rights in technical data not first produce in the performance of this Agreement which is incorporated in technical data delivered under this Agreement or which is not removed from the facility at the termination of this Agreement.
- (ii) The right of the contracting Officer or his representative to inspect at all reasonable times up to three years after final payment under this Agreement all technical data first produced in the performance of this Agreement (for which inspection the User or its subcontractor shall afford proper facilities to DOE); and
- (iii) The right to have any technical data first produced or specifically used in the performance of this agreement delivered to the Government as the Government may from time to time direct during the progress of the work or upon completion or termination of this agreement.

- (2) The User agrees that to the extent it receives or is given access to proprietary data or other technical, business or financial data in the form of recorded information from DOE or a DOE contractor or subcontractor, the User shall treat such data in accordance with any restrictive legend contained thereon, unless use is specifically authorized by prior written approval of the Government.

(c) Copyrighted Material

- (1) The User agrees to, and does hereby grant to the Government, and to its officers, agents, servants and employees acting within the scope of their duties:
 - (i) A royalty-free, nonexclusive, irrevocable license to reproduce, translate, publish, use and dispose of and to authorize others so to do, all copyrightable material first produced or

composed in the performance of this agreement by the User, its employees or any individual or concern specifically employed or assigned to originate and prepare such material; and

- (ii) A license as aforesaid under any and all copyrighted or copyrightable works not first produced or composed by the User in the performance of this agreement, but which are incorporated in the material furnished under the agreement, provided that such license shall be only to the extent the User now has, or prior to completion or final settlement of the agreement may acquire, the right to grant such license without becoming liable to pay compensation to others solely because of such grant.

- (2) The User Agrees that it will not knowingly include any material copyrighted by others in any written or copyrightable material furnished or delivered under this agreement without a license as provided for in subparagraph (1)(ii) hereof, or without consent of the copyright owner, unless it obtains specific written approval of the Contracting Officer for the inclusion of such copyrighted material.

4. PUBLICATION

In order that information concerning scientific or technical developments conceived or first actually reduced to practice in the course of or under the contract is not prematurely published so as to adversely affect patent interest of DOE, the User agrees to submit to the Patent Counsel for patent review a copy of each paper 60 days prior to its intended publication date. The User may publish such information after expiration of a 60-day period following such submission or prior thereto if specifically approved by the Patent Counsel, unless the User is informed (in writing within the 60-day period) that in order to protect patentable subject matter, publication must further be delayed. In the latter event, publication shall be delayed up to 100 days beyond the 60-day period or such longer period as mutually agreed to.